

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 12,790

)

Appeal of )

)

INTRODUCTION

The petitioner appeals a decision by the Department of Social and Rehabilitation Services (SRS) denying his application for a foster care license based on his admission that he sexually abused a child some thirty years ago.

FINDINGS OF FACT

1. The petitioner was an SRS licensed foster care provider from January of 1992 until the Spring of 1993. He has had several children in his care, primarily boys, and has never had any complaints about his performance as a caregiver. SRS has been satisfied with the care he has given to children placed in his home.
2. In October of 1992, the petitioner's sister-in-law, who lives in a distant state, sent a letter to SRS, stating that the petitioner had sexually molested her and another younger sister when they were children. The letter was prompted by her concern that the state was about to place a girl in his care.
3. The report was investigated by SRS and included an interview with the petitioner. At the interview the

petitioner admitted that many of the core facts alleged by the sister-in-law had indeed occurred.

4. Based upon the petitioner's admissions, which were reconfirmed under oath at the hearing, the following are found as facts herein: Sometime around 1964, when the petitioner was twenty-one or twenty-two years old, he lived in the home of his future wife, who was then fifteen, as a boarder. The wife was the oldest of a large family which had just recently lost their mother. The father took in boarders because he needed the money and set a rather libertine tone for the household, frequently inviting women to stay overnight in his room and failing to shield the children from adult sexual behavior. The petitioner had a room near the downstairs bathroom and, in this sexually provocative

environment, got into the habit of watching his future wife's eleven or twelve year old sister use the bathroom. He eventually came into the bathroom on occasion and touched her in the vaginal area and asked her to urinate on his hands. He also asked her to touch his penis. This behavior went on for about six months. Eventually, disturbed by his own behavior, the petitioner moved out of the house and got a new living situation. In 1965, he married the oldest sister who is still his wife. On occasion, the younger sister, while still a teenager, came to stay in their household but the abuse did not reoccur. The petitioner said, however, that he felt tempted when she was around, and asked his wife not to have her for extended stays in the household.

5. When contacted by the investigator, the younger sister stated that she recalled the petitioner asking to put his hands down her pants when she was about nine years old and that she refused. She also stated that after the petitioner married her sister, she would sometimes sleep at their house and that he would come to her room with a flashlight and touch her on the breasts. The petitioner does not recall these events and did not agree to their accuracy although he stated that it could have occurred and he may have forgotten over the last thirty years. Because there was no admissible evidence presented to prove these allegations, they are not found as facts herein.

6. The Department's investigator concluded that the petitioner's behavior of some thirty years prior was child sexual abuse because it involved an adult touching a child (a person ten years younger than himself) on the genital area for his own sexual gratification. Because both of the girls involved are now adults, he took steps to protect the

child who was then in the petitioner's care, a young boy, whom he deemed to be a child who was threatened with harm.

7. Pursuant to the investigator's report, a decision was made by the licensing chief (a clinical psychologist with some twenty-four years of experience in foster home licensing) to remove the boy from the petitioner's home and to revoke the petitioner's foster care license for violating Regulation 038.3, which allows revocation if the foster parent has abused or neglected a child. He did not feel, however, that there was sufficient evidence to find threatened harm as to the particular child in care. The decision to revoke was based on his judgment that no one who has a substantiation of child sexual abuse as an adult should have a foster care license regardless of current behavior because it is impossible to predict the likelihood that it will not occur again. The provocative atmosphere and the petitioner's relative youth in this case were not felt to be mitigating factors. Most influential was the fact that the petitioner was an adult who was a good deal older than his victim and should have been responsible for thinking through and resisting the situation. The Department reasoned that foster parents are, in fact, frequently placed in provocative situations with extremely sexualized children and are expected to act responsibly. The petitioner's actions, even though they occurred thirty years ago, were sufficient to raise serious questions about his ability to react in a similar situation. Finally, the petitioner, who apparently recognized that he had an impulsive problem, never sought counseling to deal with it. Of importance to the Department is the fact that research has shown that untreated offenders are likely to re-offend

again at some point. The petitioner was notified of that decision by letter dated December 10, 1992.

8. The petitioner appealed SRS's decision and the Commissioner held a review of the licensing chief's rationale. At that review, the petitioner presented letters from friends attesting to his high moral

character, his good rapport with children and his success at raising his own two children. He also submitted a letter from his last foster boy's pediatrician attesting that the petitioner had been giving the boy the structure and stability that he needed and that his emotional state had improved while in the petitioner's care. The petitioner offered his own testimony that he had become a changed person in the thirty intervening years, particularly because he had become a Christian and practiced the values and morals of those beliefs. Family witnesses and friends attested at the review that no further similar incidents have occurred in the last thirty years.

9. On February 19, 1994, the Commissioner wrote to the petitioner that he agreed with the revocation action. The Commissioner, after stating that he had reviewed the above evidence, concluded as follows:

This information would indicate that you are a citizen in good standing in your community and have done a good job caring for a foster child. On the other hand, the Department's licensing procedures are a matter of risk reduction. Nor is there any good way of predicting, with a high degree of certainty, the future behavior of individuals who in the past have molested a child. In addition, I am concerned that if you continue as a foster parent you would be in a very vulnerable position should any child make such an accusation against you, given the information that has now come to light. Because of the Department's responsibility regarding issues of risk in foster care, it is my decision to uphold the proposed revocation of your foster care license. I regret that these decisions sometimes imply a general characterization of worth or standing in the community when that is not the case. Nevertheless, it is my belief that this is the correct choice to make and it is the position that the Department will pursue before the Human Services Board, should you choose to follow through with your appeal.

10. The petitioner did appeal that decision. However, he withdrew that appeal during the prehearing conference phase when he learned that, even were his license to remain, the Board could not order the Department to restore any particular foster child to his household.

11. Upon the withdrawal of his hearing request, the Department finally revoked the petitioner's foster care license. Shortly thereafter, however, the petitioner regretted his decision, reapplied for a foster license and commenced a campaign to have the last foster boy returned to his home. That license was denied based on the same facts as the revocation decision, that the petitioner had sexually abused a child thirty years before. Persons who are friends of the petitioner, complained of this action to the governor and state representatives. The petitioner wrote to the Commissioner asking him to review the decision again. On March 22, 1994, the Commissioner wrote a letter to the petitioner and his wife, explaining the basis for his

decision. A copy of that letter is attached as Exhibit One and is incorporated herein by reference.

12. On April 21, 1994, this matter was appealed to the Human Services Board, and heard several weeks later. In addition to all of the facts and evidence catalogued above, letters dated May 15, 1994, and May 31, 1994, from each of the petitioner's wife's sisters who were the subjects of the abuse investigation were placed into evidence. The letter from the older sister, whom the petitioner admitted to sexually molesting, did not deny the facts set out above. Instead, she attempted to explain and excuse these facts by saying that the petitioner was inexperienced, was being instructed about the female anatomy by his pastor, and had indulged in what she would characterize only as "mild touching and looking." She also stated that the petitioner stopped as soon as she spoke up for himself. She characterized him as a person

with a sheltered upbringing who was acting more like "an inexperienced boy than an adult child molester." The letter from the second sister also characterized his actions as "very mild" compared to other sexual abuse experiences she had as a child and felt that the petitioner was merely "an inexperienced man who was curious." Both sisters expressed regret for making trouble

for their brother-in-law whom they both felt was a changed man who had led a responsible life.

13. At the hearing, several witnesses, including a child of the petitioner and his friends, testified that the petitioner was a good parent, good with adolescents and teenagers and that they were totally unaware of any allegations of molestation against the petitioner in the last 30 years. This testimony is found to be entirely credible.

14. The petitioner himself testified, again entirely credibly, that whatever incidents occurred at that time in his life were the result of his immaturity in an overwhelmingly provocative situation and that he has since matured, been changed by his religious beliefs and for the past twenty-five years has been involved in an entirely positive and nurturing way with his own two children and nine grandchildren, their friends and other foster children (sent to him both by a private children's organization from 1981 to 1988 and since 1992 by the Department). He has attempted recently to get counseling but has been unable to find anyone who had time for him. In any event, he believes at this point in his life that counseling is a waste of time.

### ORDER

The decision of the Department of Social and Rehabilitation Services is affirmed.

### REASONS

The Commissioner of the Department of Social and Rehabilitation Services is charged by the legislature with the administration of the foster care program. See, generally, 33 V.S.A. § 304(b)(2), and 3501. The statute also specifically gives the Commissioner the duty and authority to

"issue regulations governing application for, and issuance, revocation, term and renewal of licenses and registration. In the regulations he may prescribe standards and condition to be met, records to be kept and reports to be filed.

33 V.S.A. § 306 (1)

Pursuant to this authority, SRS has adopted the

following pertinent regulations:

010 Under the Authority of 33 V.S.A. § 3501, the Department of Social and Rehabilitation Services is responsible for the licensing of family foster homes. These regulations for the provision of foster care

have been established in order to assure the care and safety of children who must live in homes other than their own. A license is issued if the foster home and prospective foster parent(s) meet these regulations. If the department finds that the applicant(s) of licenses(s) is unwilling or unable to meet these regulations, the license will be denied or revoked.

...

038 A license may be denied or revoked if the applicant, licensee or other member of the household:

...

038.3 Has abused or neglected a child.

035 The state licensing authority may grant a variance from a specific regulation upon its determination that the applicant or licensee will otherwise meet the goal of the regulation. A variance may contain provisions or limitations.

Licensing Regulations for Family Foster Care September 1, 1992

Under these regulations, the Commissioner has the discretion to deny a license to an applicant who has abused a child. The petitioner in this matter agrees that he sexually abused a child thirty years ago. The only remaining question is whether the Commissioner's decision to deny the license based on an event which occurred thirty years ago is arbitrary, capricious or an abuse of his discretion.

In this matter, the petitioner argues that there is no reason to deny his license because the event which occurred thirty years ago happened in unusually provocative circumstances at a time when, although he was a chronological adult, he was emotionally immature. In addition, all of the evidence since that time indicates that he has become a mature, responsible person who in no way abuses children. In the petitioner's view, this event is so far in the past and so superseded by positive events, that he no longer presents any kind of a threat to children.

On the other hand, trained professionals who work for the Commissioner know from research that there is a strong likelihood that untreated persons who abuse children are likely to abuse again. Even if that seems even likely in a given case, research has not turned up any tool for predicting which is likely and which is not. The Commissioner feels that there is a risk in letting any individual who has sexually abused children be a foster parent, particularly because foster children are frequently sexualized or provocative.

It would certainly be reasonable for the Commissioner in this instance to conclude that the petitioner's excellent track record for most of his life makes him a decidedly low risk for repeated child abuse. Such a decision would be entirely justifiable under these circumstances. However, it would also be reasonable for the Commissioner to decide, as he has here, that the consequences to any child from sexual abuse are so great that the risk of that occurring has to be absolutely minimized. One way you minimize that risk is by eliminating all persons with a past history of child abuse from the foster parent pool.

It is not the Board's role to determine whether the Commissioner made the best decision here. The role of a Board reviewing a discretionary decision is to determine whether the decision reached has some

reasonable basis. Given the fact that the Commissioner was aware of all the facts in this matter, considered and reviewed all those facts and reached a decision based on and supported by significant facts in this matter, it must be concluded that the Commissioner's decision was both procedurally and substantively reasonable. Even if the Board would reach a different decision in this matter, it is not free to substitute its discretion for the reasonably exercised discretion of the Commissioner. 3 V.S.A. § 3091 (d) and Fair Hearing Rule No. 19. The Commissioner has made a tough, but reasonable, call and the Board is bound to stand by it.

The Commissioner has taken considerable pains to explain to the petitioner that the denial is not based upon his opinion that the petitioner is otherwise unsuited to care for children. The petitioner is obviously a person of unusual candor and high principles who felt it important to affirm the memory of his victim and to take responsibility for his actions of long ago. There is every reason to believe that he scrupulously conducts his life and has positive relationships with children. This decision should not be viewed as diminishing his current accomplishments.

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